



**Macharia v Murage (Environment & Land Case 283 of 2017)
[2023] KEELC 16007 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16007 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 283 OF 2017
FM NJOROGE, J
MARCH 9, 2023**

BETWEEN

WAWERU MACHARIA PLAINTIFF

AND

FRANCIS MURIGU MURAGE DEFENDANT

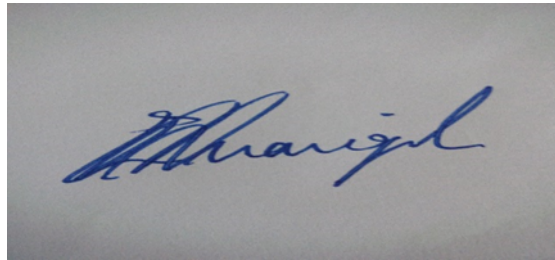
RULING

1. An objection has been raised by counsel for the defendants to the production of an agreement as an exhibit in the present case by the witness now testifying as PW2. The witness states that the agreement was found amongst the documents of the deceased original plaintiff.
2. One of the grounds for the objection is that the pleadings reflect that the agreement that the original plaintiff relied on was an oral agreement, and that if the written agreement had existed then the original plaintiff would not have pleaded as he did, stating that the agreement was oral.
3. The other reason is that the document intended to be produced is a copy and no explanation has been given by the witness as to the whereabouts of the original. Section 66 of the *Evidence Act* was relied on.
4. Mr. Ndubi on his part pointed out that the suit was instituted 19 years ago and that the introduction of a written agreement in the circumstances would change the character of the suit. He also stated that another witness can be called to produce the agreement. Secondly Mr Ndubi submitted that the agreement that was intended to be produced was for parcel number 7912/3 and not 9712/3. He concluded that the witness PW2 is not the person competent to produce such a document.
5. In response Mr. Kagucia submitted that the witness had already stated that the witness had already testified to the effect that she had found the said agreement in the deceased's house amongst his documents, that she testifies as a custodian of the document and that since he is deceased and the law allows it another person may be allowed to produce the document as evidence.



6. I have considered the objection and the response thereto. In this court's view a good background has been laid by the witness PW2 for the production of the document at hand in so far as she has stated that she found the document amongst the possessions of the deceased whose estate she represents. I think Mr. Kagucia is right when he submits that the witness may produce the said agreement in her capacity as a person in whose custody it has been. As to the ground that it mentions the wrong parcel number I think that that is an issue to be reserved for cross examination and subsequently to be addressed in submissions of the parties at the conclusion of the suit.
7. Consequently, I hereby allow the production of the agreement by PW2 and I order that it be marked as P. Exh.5(d).
8. The suit shall be mentioned on the March 16, 2023 for the fixing of a hearing date.

Dated, signed and delivered at Nakuru via electronic mail on this 9th day of March 2023.



**MWANGI NJOROGE
JUDGE, ELC, NAKURU**

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